Supreme Court, U.S.
FILED

98 996 DEC 17 1998

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

SAUL NAVAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district courts had subject-matter jurisdiction, on petitions for a writ of habeas corpus filed by respondents Navas, Mojica, and Yesil, to entertain their challenges to the Attorney General's decisions that they are statutorily ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), or their constitutional challenges to that provision of the Immigration and Nationality Act.

2. Whether the court of appeals had jurisdiction to entertain similar challenges to deportation orders entered against respondents Navas and Henderson on their petitions for review filed directly in the court of appeals.

3. Whether the Attorney General permissibly concluded that the amendments to 8 U.S.C. 1182(c) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, providing that certain classes of aliens are categorically ineligible for relief from deportation under Section 1182(c), should apply in the cases of aliens who had already been convicted of crimes rendering them deportable, or had already filed applications for Section 1182(c) relief, before the date of AEDPA's enactment.

PARTIES TO THE PROCEEDING

Petitioners are Janet Reno, the Attorney General of the United States; Doris Meissner, the Commissioner of Immigration and Naturalization; the Department of Justice; the Immigration and Naturalization Service (INS); Lynne Underwood, District Director of the INS in New Orleans; Edward McElroy, District Director of the INS in New York; and Nancy Hooks, Officer in Charge of the INS Office in Oakdale, Louisiana.

Respondents are Saul Navas, Guillermo Mojica, Engin Yesil, and Franklin Henderson.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General, the Commissioner of Immigration and Naturalization, the Department of Justice, the Immigration and Naturalization Service (INS), the District Directors of the INS in New Orleans and New York, and the Officer in Charge of the INS Office in Oakdale, Louisiana, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals from which review is sought (App. 1a-59a)[1] is reported at 157 F.3d 106. The further order of the court of appeals certifying questions to the New York Court of Appeals (App. 334a-339a), and the order

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[1] "App." refers to the separately bound appendix to this petition.

of the New York Court of Appeals declining certification (App. 340a-344a) are not yet reported.

The order and oral decision of the immigration judge (IJ) granting discretionary relief from deportation to respondent Navas (App. 63a-65a, 66a-79a) and the decision of the Board of Immigration Appeals (BIA) reversing that grant of relief (App. 80a-81a) are unreported. The opinion of the district court granting habeas corpus to Navas (App. 82a-205a) is reported at 970 F. Supp. 130.

The order of the IJ denying discretionary relief from deportation to respondent Mojica (App. 206a-207a) and the decision of the BIA affirming that denial of relief (App. 214a-215a) are unreported. The order of the district court granting habeas corpus to Mojica (App. 82a-205a) is reported at 970 F. Supp. 130.

The order of the IJ denying discretionary relief from deportation to respondent Yesil (App. 218a-221a) is unreported, as are the decisions of the BIA affirming that denial of relief (App. 222a-231a) and denying Yesil's motion to reopen (App. 232a-236a). The opinions of the district court granting habeas corpus to Yesil (App. 248a-290a) and denying the government's motion for reconsideration (App. 291a-319a) are reported at 958 F. Supp. 828 and 973 F. Supp. 372, respectively.

The order and the oral decision of the IJ granting relief from deportation to respondent Henderson (App. 320a-322a, 323a-331a) are unreported, as is the decision of the BIA reversing that grant of relief (App. 332a-333a).

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1998. App. 60a-62a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 345a-354a) are pertinent provisions of the Suspension of Habeas Corpus Clause of the Constitution of the United States, U.S. Const. Art. I, § 9, Cl. 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Section 1182(c) of Title 8, as in effect after April 24, 1996; Section 1252(a) and (g) of Title 8; Sections 401(e) and 440(a) and (d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (enacted Apr. 24, 1996); Sections 304, 306, and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C (enacted Sept. 30, 1996); and Section 2241 of Title 28, United States Code.

STATEMENT

This petition arises out of four immigration proceedings in which the Attorney General concluded that the aliens were statutorily ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). Those proceedings resulted in five cases that were consolidated for decision and were the subject of a single judgment (App. 60a-62a) in the court of appeals. The cases present important questions concerning the application and, potentially, the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those questions are closely related to the questions presented in the government's pending petitions for a writ of certiorari in *Reno* v. *Goncalves*, No. 98-835, and *INS* v. *Magana-Pizano*, No. 98-836 (both filed Nov. 18, 1998).[2] We therefore suggest that

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[2] We are providing counsel for respondents in these cases with copies of our certiorari petitions in *Goncalves* and *Magana-Pizano*.

the Court hold the petition in this case pending its disposition of the petitions in those cases.

1. *Statutory Background*

Two enactments by Congress are particularly pertinent to this case: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could (like other permanent resident aliens) apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1101(a)(43) (1994), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[3] If the Attorney General, in the exercise of her discretion, denied relief, then the alien could challenge that denial by filing a petition for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incor-

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[3] Although Section 1182(c) by its terms allowed the Attorney General to admit permanent resident aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had long been interpreted (in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976)) also to permit the Attorney General to waive the grounds for deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I.& N. Dec. 26 (BIA 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

porating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*). Under certain circumstances, an alien in custody pursuant to an order of deportation could also seek judicial review thereof by filing a petition for a writ of habeas corpus, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders.

i. On April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section. Among the aliens made ineligible for such relief are those who are deportable because they have been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of misconduct, see 8 U.S.C. 1251(a)(2)(A)(ii) (1994), and those who have been convicted of a controlled substance offense, see 8 U.S.C. 1251(a)(2)(B) (1994). At the same time, AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), which had permitted aliens in custody pursuant to an order of deportation to obtain judicial review thereof in habeas corpus proceedings, and replaced it with an express *prohibition* of judicial review of deportation orders for aliens who are deportable by reason of having committed the same offenses. AEDPA §§ 401(e) and 440(a), 110 Stat. 1268, 1276. Thus, since the enactment of AEDPA, 8 U.S.C. 1105a(a)(10) has provided that any final order of deportation against an alien who is deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277.

ii. On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed Section 1182(c) on a prospective basis, and replaced it

with another form of discretionary relief from deportation, known under the new nomenclature of "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. II 1996). Certain classes of criminal aliens were made ineligible for cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(C) (Supp. II 1996). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern these consolidated cases. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For cases commenced prior to April 1, 1997, including these, IIRIRA retained 8 U.S.C. 1182(c), including the amendments made by Section 440(d) of AEDPA that rendered certain classes of criminal aliens ineligible for relief under 8 U.S.C. 1182(c). See IIRIRA § 309(c)(1), 110 Stat. 3009-625.

IIRIRA also replaced the INA's judicial review provision in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. II 1996), again for cases in which the administrative procedures were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. The new Section 1252, like its predecessor, provides for judicial review of all final removal orders in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1252(a)(1) (Supp. II 1996). Section 1252 also carries forward the preclusion of review in 8 U.S.C. 1105a(a)(10)(1994) (as amended by AEDPA § 440(a)), by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime within one of several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). The new Section 1252 further provides, in a paragraph entitled "CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW," that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provi-

sions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

Judicial review in cases (such as these) in which the administrative proceedings were begun prior to April 1, 1997, continues to be governed by 8 U.S.C. 1105a (1994), as amended by AEDPA. See IIRIRA § 309(c)(2), 110 Stat. 3009-626. Even for such cases, however, Congress enacted special rules for any such cases in which the final deportation order is entered on or after October 31, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial review in 8 U.S.C. 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed ~~[specified criminal offenses]~~." 110 Stat. 3009-626.

Finally, Congress included in IIRIRA a sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(g) (Supp. II 1996), which provides:

> Except as provided in [8 U.S.C. 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

The new Section 1252(g) was expressly made applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657).

c. After the enactment of these major immigration laws, two important questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, which (as we have said) amended 8 U.S.C. 1182(c) to bar the granting of relief to certain criminal aliens:

i. First, the question arose as to whether the amendment to Section 1182(c) made by Section 440(d) of AEDPA applies to aliens who had been placed in deportation proceedings, or who had been convicted of crimes rendering them deportable, before the enactment of AEDPA. On June 27, 1996, a closely divided Board of Immigration Appeals (BIA) initially decided that Section 440(d) generally applies in deportation proceedings that had already been initiated (as well as those initiated after AEDPA's enactment), but that it should not be applied in the cases of aliens who had filed applications for Section 1182(c) relief in those proceedings before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (BIA June 27, 1996) (App. 355a-387a). On September 12, 1996 (before IIRIRA was enacted), the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the opinion of the BIA in *Soriano* and certified for her decision the question whether Section 440(d) applies to applications filed as of the date of its enactment.[4] App. 388a.

On February 21, 1997, the Attorney General concluded in *Soriano* that AEDPA Section 440(d) applies to all deportation proceedings pending on the date of enactment, including those in which aliens had already submitted applications for

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[4] Also on September 12, 1996, the Solicitor General filed a supplemental brief in this Court in *INS* v. *Elramly*, No. 95-939, addressing the temporal scope of Section 440(d). In that brief, we argued (at 15-18) that Section 440(d) had divested the Attorney General of authority to grant Section 1182(c) relief even in pending cases. On September 16, 1996, the Court remanded *Elramly* to the court of appeals for further consideration in light of AEDPA. *INS* v. *Elramly*, 518 U.S. 1051 (1996).

Section 1182(c) relief. App. 389a-402a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of [the alien's] conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." App. 395a-396a. The Attorney General further concluded that Section 440(d) "is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." App. 396a.

ii. Second, the question arose whether Section 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad and are seeking admission to the United States, as well as to criminal aliens in the United States who are in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. No. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. No. 3320 (June 19, 1997), that Section 440(d) bars relief only for criminal aliens (such as respondents here) who are in deportation proceedings.

2. *Administrative and District Court Proceedings*

a. *Saul Navas.* Respondent Navas is a native and citizen of Panama who entered the United States as an immigrant in 1987. In March 1995, he was convicted in New York state court of criminal possession of stolen property in the third degree; in May 1995, he was also convicted of robbery in the second degree. See App. 67a. Because those offenses were "crimes involving moral turpitude" and did not arise out of a single scheme of criminal misconduct, they rendered Navas

deportable under 8 U.S.C. 1251(a)(2)(A)(ii) (1994) (now recodified at 8 U.S.C. 1227(a)(2)(A)(ii) (Supp. II 1996)).

Navas applied to the immigration judge (IJ) for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), and on May 9, 1996, the IJ granted that relief. App. 63a-79a. The Immigration and Naturalization Service (INS) appealed the grant of relief to the BIA. On March 14, 1997, the BIA, relying on the Attorney General's decision in *Soriano*, held that Navas was statutorily ineligible for relief under Section 1182(c), and ordered him deported. App. 80a-81a.

Navas then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He also filed a petition for review directly in the United States Court of Appeals for the Second Circuit. He contended that the Attorney General had erred in concluding that the amendments to Section 1182(c) made by Section 440(d) of AEDPA are applicable to aliens who were placed in deportation proceedings prior to the enactment of AEDPA. He also contended that Section 1182(c) violates constitutional equal-protection principles insofar as it is applied to bar relief to criminal aliens who (like himself) had been placed in deportation proceedings in the United States, but not to aliens who had temporarily proceeded abroad and had been placed in exclusion proceedings when they sought to return to the United States.

On July 11, 1997, the district court rejected the government's arguments and granted habeas corpus to Navas. App. 82a-205a. It first concluded (*id.* at 138a-160a) that it had jurisdiction to entertain Navas's challenge to his deportation order (including the denial of dicretionary relief from deportation) under the general federal habeas corpus statute, 28 U.S.C. 2241, which, it ruled, had not been affected by the jurisdiction-limiting provisions enacted by Congress in AEDPA and IIRIRA. It then concluded on the merits (App. 169a-204a) that the amendments to Section 1182(c) made by

Section 440(d) of AEDPA did not apply to aliens who had filed an application for discretionary relief—or indeed to aliens whose convictions were entered—before the date of AEDPA's enactment. The district court therefore remanded the case to the BIA for consideration of Navas's application for relief from deportation. App. 202a.

b. *Guillermo Mojica.* Respondent Mojica is a native and citizen of Colombia who became a lawful permanent resident alien in 1972. App. 9a. In 1988, he was convicted of conspiracy to distribute cocaine, in violation of federal law, which rendered him deportable under 8 U.S.C. 1251(a)(2)(B)(i) (1994) (now recodified at 8 U.S.C. 1227(a)(2)(B)(i) (Supp. II 1996)). Mojica was released from prison in 1990. In January 1996 (before the enactment of AEDPA), upon Mojica's return to New York from a trip abroad, the INS moved to exclude him from the country based on his conviction. On May 29, 1996 (after AEDPA's enactment), the INS officially admitted Mojica into the country, but then placed him in deportation proceedings. INS took Mojica into custody and transferred him to an INS facility in Oakdale, Louisiana; he was released on bond, and he returned to New York. Subsequently the INS directed him to surrender in Oakdale, and he did so. App. 9a-10a.

Mojica appeared before an IJ in Louisiana, conceded deportability, and sought to apply for relief from deportation under Section 1182(c). App. 209a-210a.[5] The IJ concluded that he was statutorily ineligible for Section 1182(c) relief. App. 214a. The BIA agreed, and rejected his contention that the amendments to Section 1182(c) made by Section 440(d) of AEDPA did not apply to aliens whose convictions were entered before the date of AEDPA's enactment. App. 215a.

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[5] The IJ's order states that Mojica did not seek relief from deportation (App. 206a), but the transcript of the deportation hearing indicates otherwise (App. 210a).

Mojica then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The district court addressed Mojica's habeas petition in conjunction with that filed by respondent Navas. As in Navas's case, the court ruled that it had subject-matter jurisdiction over Mojica's habeas petition under 28 U.S.C. 2241. App. 138a-160a. The court also held, contrary to the government's contention, that it had personal jurisdiction over Mojica's custodians, even though Mojica was held in custody in Louisiana, because, it ruled, (a) the INS District Director for New Orleans had sufficient contacts with New York to justify the exercise of jurisdiction over him (App. 162a-164a), and (b) the Attorney General, who is amenable to the court's jurisdiction in New York, was in any event a proper respondent to Mojica's habeas petition (App. 164a-166a). The court further ruled, on the merits, that Section 440(d) did not bar relief in cases such as Mojica's, in which the alien's conviction had been entered before the enactment of AEDPA, and it granted habeas corpus to Mojica. App. 169a-204a.

c. *Engin Yesil.* Engin Yesil is a native and citizen of Turkey. He arrived in the United States on a student visa in 1979, married a United States citizen in 1987, and applied for lawful permanent resident status on November 17, 1987. He was granted conditional permanent resident status on March 25, 1988. The condition to that status was removed in 1990. App. 11a, 223a, 276a.

In 1990, Yesil was convicted of aiding and abetting the distribution of cocaine in violation of federal law. App. 11a. On January 5, 1994, while Yesil was still incarcerated, the INS commenced deportation proceedings against him based on that conviction. Yesil was transferred from the Federal Correctional Institution (FCI) in Tallahassee, Florida, to the FCI in Oakdale, Louisiana, and was subsequently released on bond, whereupon he moved to New York. App. 11a. On

August 31, 1994, the IJ denied Yesil's request for a change of venue of his deportation proceeding to New York, and found him deportable. App. 219a, 221a. The IJ also rejected Yesil's application for Section 1182(c) relief. The IJ concluded that Yesil had not acquired the seven years' lawful domicile necessary under Section 1182(c) for such relief because Yesil was not entitled to the benefit of any time before March 25, 1988, the date on which he was granted lawful permanent resident status. App. 220a-221a. In a decision entered March 17, 1995, the BIA upheld the IJ's decision. App. 225a-231a; see also App. 233a-236a (BIA decision denying Yesil's motion to reopen).

Yesil then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. He contended that the BIA had erred in concluding that he was ineligible for Section 1182(c) relief, and that, under Second Circuit precedent, he had acquired the requisite seven years' lawful domicile for eligibility. On February 27, 1997, the district court issued an opinion agreeing with Yesil, granted habeas corpus, and remanded the case to the BIA for the exercise of its discretion under Section 1182(c). App. 248a-290a. The court concluded that it had personal jurisdiction over the New Orleans District Director of the INS as a respondent to Yesil's habeas petition based on that official's contacts with New York (App. 261a-264a), and that it had subject-matter jurisdiction under 28 U.S.C. 2241 (App. 265a-276a). As for Yesil's statutory eligibility for relief, the court ruled that Yesil was entitled to count the beginning of his lawful domicile in this country as November 17, 1987, when he applied for lawful permanent resident status, and therefore that Yesil had acquired seven years' lawful domicile. App. 277a-284a.

On March 10, 1997, after the government attorneys learned of the Attorney General's decision in *Soriano*, the government moved for reconsideration, arguing that Yesil

was statutorily ineligible for Section 1182(c) relief under that decision. The district court denied that motion, and rejected the Attorney General's construction of Section 440(d) of AEDPA in *Soriano*. It concluded that Section 440(d) did not bar the granting of Section 1182(c) relief to aliens who had already applied for such relief before AEDPA's enactment. App. 302a-319a.

d. *Franklin Henderson.* Respondent Henderson is a native and citizen of the Dominican Republic who entered the United States as a lawful permanent resident in 1968. In 1987, he was convicted in New York state court of criminal possession of a controlled substance in the second degree. App. 324a. In February 1994, the INS initiated deportation proceedings against him based on that conviction. His deportation hearing was not held until May 2, 1996, after AEDPA's enactment. At the hearing, Henderson conceded deportability but applied for relief from deportation under Section 1182(c). The IJ concluded that Henderson was eligible for relief, notwithstanding the enactment of Section 440(d), which the IJ held did not apply to aliens whose convictions occurred before the enactment of AEDPA, App. 329a-330a, and granted him relief, App. 326a-327a. On March 21, 1997, the BIA reversed, based on the Attorney General's decision in *Soriano*, and entered a deportation order against Henderson. App. 332a-333a.

3. *The Court of Appeals' Decision*

The government appealed the district courts' grants of habeas corpus to Navas, Mojica, and Yesil; Navas and Henderson also filed petitions for review of their deportation orders directly in the court of appeals.[6] The court of appeals consolidated the five cases. In a single judgment (App. 60a-

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[6] Henderson also filed in district court a petition for a writ of habeas corpus, on which no action has been taken. App. 7a n.5.

62a), the court of appeals affirmed the district court's grant of habeas corpus to Navas, dismissed for lack of subject-matter jurisdiction Navas's and Henderson's petitions for review, and certified to the New York Court of Appeals questions relating to personal jurisdiction in the *Mojica* and *Yesil* cases (over which it retained jurisdiction).

a. *Subject-Matter Jurisdiction.* After reviewing the history of judicial review of immigration matters and Congress's 1996 changes to the immigration laws (App. 13a-26a), the court recognized that those amendments "were clearly meant to constrict the availability of judicial review of deportation orders against criminal aliens." App. 27a. The court also considered itself bound to follow previous decisions of the Second Circuit stating that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA had divested the courts of appeals of *all* jurisdiction to entertain challenges to deportation orders raised in petitions for review filed by certain criminal aliens, even constitutional challenges to provisions of the INA. See App. 13a, 27a-30a (discussing *Hincapie-Nieto* v. *INS*, 92 F.3d 27 (2d Cir. 1996), and *Jean-Baptiste* v. *Reno*, 144 F.3d 212 (2d Cir. 1998), pet. for reh'g pending (filed July 6, 1998)). The court further observed that *Jean-Baptiste*, as well as decisions of other circuits, had stated that this repeal of the court of appeals' jurisdiction on direct review of deportation orders "suffers from no constitutional infirmity because the courts retain habeas jurisdiction under 28 U.S.C. § 2241." App. 27a; see App. 13a.

The court followed that circuit precedent and held that it did not have subject-matter jurisdiction over Navas's and Henderson's direct petitions for review, but that the district courts did have jurisdiction to review deportation orders on petitions for a writ of habeas corpus. App. 13a-14a, 30a. The panel stated, however, that "[w]ere we not bound by *Jean-Baptiste*, [we] would be strongly inclined to find that the

proper mechanism for judicial review is by petition for review in the court of appeals, rather than by § 2241 habeas in the district courts." App. 30a n.9. It observed that "review in the courts of appeals seems more consistent with congressional intent," as "Congress clearly meant to streamline judicial review," and "it seems perverse to find that the new laws actually *added* a layer of review in the district courts that did not generally exist before." *Ibid.*[7]

The court also concluded that the district courts' habeas jurisdiction covered the non-constitutional (as well as the constitutional) challenges made in this case. Framing the question as whether "the courts are without power to review the Attorney General's interpretation of the immigration laws," App. 31a, the court stated that "in the immigration context, review of statutory questions was deemed essential to ensuring due process of law," App. 34a-35a. The court declined to say that "every statutory claim that an alien might raise is cognizable on habeas," but it did rule that "those [statutory claims] affecting the substantial rights of aliens of

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[7] In *Jean-Baptiste*, a group of criminal aliens filed a class action in district court, contending that their deportation proceedings deprived them of due process because they were not notified that their convictions on certain criminal offenses would render them deportable. The court of appeals held that 8 U.S.C. 1252(g) (Supp. II 1996) deprived the district court of jurisdiction to review that claim. 144 F.3d at 218. The court also stated, however (*id.* at 219-220), that Section 1252(g) raised no constitutional concerns because (it concluded) the district courts retained at least some jurisdiction to review challenges to deportation orders under 28 U.S.C. 2241. Relying on its decision in *Hincapie-Nieto*, the court also rejected (144 F.3d at 219) the government's argument that a constitutional challenge to a deportation order could be raised, if at all, only in a petition for review filed directly in the court of appeals. Before the court of appeals issued its decision in this case, the government filed a petition for rehearing in *Jean-Baptiste* (albeit questioning whether the panel's statements in that case that the district courts retained habeas corpus jurisdiction constituted a holding or dicta); that rehearing petition is still pending.

the sort that the courts have secularly enforced" are so cognizable, and found the statutory questions in this case, concerning discretionary relief from deportation, to be "of this variety." App. 36a.

b. *Personal Jurisdiction.* The court declined to reach a definitive conclusion whether the district courts had personal jurisdiction over any proper respondent to Mojica's and Yesil's habeas petitions.[8] Mojica and Yesil had named the INS District Director in New Orleans as respondent to their habeas petitions because that official has primary custody over them. The government argued, however, that the District Director in New Orleans did not have sufficient contacts with the State of New York to justify personal jurisdiction over him there. After reviewing New York law on long-arm jurisdiction (App. 39a-40a), the court found itself unable to decide whether the district courts had correctly concluded that the Director had "purposefully availed" himself of the privilege of doing business in New York, such that he might be sued there. The court therefore certified to the New York Court of Appeals the questions of what contacts with New York are sufficient to satisfy the New York long-arm statute and whether the New Orleans District Director's actions with respect to Yesil or Mojica satisfied those requirements. App. 41a-42a, 334a-339a.

Mojica and Yesil had also named the Attorney General as a respondent to their habeas petitions; the government argued that she was not a proper respondent. The court found that to be a "highly complex issue that [it] ought not decide unnecessarily." App. 42a; see App. 43a-53a. It declined to make a ruling on that issue until the New York Court of Appeals answered the certified questions, because, if the New Orleans District Director was found to be properly subject to

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[8] The issue of personal jurisdiction does not arise in the cases of Navas and Henderson. See App. 37a n.16.

personal jurisdiction in New York, then it would be unnecessary to decide the propriety of naming the Attorney General as a respondent in alien habeas corpus cases. App. 42a, 52a-53a.[9]

c. *Merits.* Finally, the court ruled against the government on the merits of the non-constitutional claim made by Navas (the only respondent whose case the court has thus far found to be within its jurisdiction), concluding that the amendments made to Section 1182(c) by Section 440(d) of AEDPA do not apply to immigration cases that were already pending at AEDPA's enactment. App. 53a-58a.[10] The court aligned itself (App. 54a) with the recent decision of the First Circuit in *Goncalves* v. *Reno*, 144 F.3d 110, 126 (1998), petition for cert. pending, No. 98-835 (filed Nov. 18, 1998), which also concluded that those statutory amendments did not apply to cases pending at their enactment, and rejected the At-

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[9] The court entered a separate order certifying two questions to the New York Court of Appeals. App. 334a-349a. The New York Court of Appeals subsequently declined certification of those questions. App. 340a-344a. No further action has been taken by the Second Circuit on the issue of personal jurisdiction.

[10] The court therefore did not reach Navas's broader argument (which was made by several of the other respondents as well) that the amendments to 8 U.S.C. 1182(c) made by AEDPA Section 440(d) do not apply to any aliens whose convictions occurred prior to the enactment of AEDPA. App. 53a n.28. Because the court had certified the question of personal jurisdiction in Yesil's case, it likewise did not reach Yesil's separate non-constitutional claim, that he had accrued the requisite seven years' lawful domicile for eligibility for Section 1182(c) relief. App. 53a n.27. The court also did not reach any of the respondents' constitutional challenges to their deportation orders. In Mojica's case, the court concluded that Mojica's deportation proceeding began before the enactment of AEDPA (when he returned from abroad and was placed in exclusion proceedings), not after that enactment date, when the INS terminated his exclusion proceedings and placed him in deportation proceedings. App. 58a n.30.

torney General's conclusion in *Soriano* that the amendments are applicable to pending cases.[11]

REASONS FOR GRANTING THE PETITION

1. The court of appeals has erroneously concluded that criminal aliens may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of their orders of deportation. That conclusion conflicts with the decision of the Eleventh Circuit in *Richardson* v. *Reno*, No. 98-4230, 1998 WL 850045 (Dec. 9, 1998), which concluded that Congress stripped "all jurisdiction, including § 2241 habeas, from the district courts" and placed exclusive judicial review of deportation orders in the courts of appeals. *Richardson*, 1998 WL 850045, at *4. It also cannot be squared with the structure of judicial review of deportation orders that Congress has enacted, and it could lead to significant delays in the removal of criminal aliens from the United States, despite Congress's particular concern that removal of criminal aliens be expedited. Because the court's decision on subject-matter jurisdiction raises issues closely related to those presented in *Reno* v. *Goncalves*, petition for cert. pending, No. 98-835, and *INS* v. *Magana-Pizano*, petition for cert. pending, No. 98-836 (both filed Nov. 18, 1998), we suggest that the Court hold this petition pending the disposition of the certiorari petitions in *Goncalves* and *Magana-Pizano*.

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[11] Although the court concluded that it lacked jurisdiction in Henderson's case, it also ruled that aliens like Henderson, who had filed petitions for direct review of their deportation orders, and who had received stays of such orders during their judicial proceedings, should have their stays continued while they sought habeas corpus review in district court under 28 U.S.C. 2241. App. 58a-59a. The court also continued to stay the deportations of Mojica and Yesil pending further proceedings in those cases. App. 59a.

The court of appeals in this case, like the First Circuit in *Goncalves* v. *Reno*, 144 F.3d 110 (1998), concluded that AEDPA and IIRIRA did not expressly amend or repeal Section 2241, and so those statutes should not be read to preclude criminal aliens' access to the district courts under Section 2241. See App. 13a, 27a-28a; *Goncalves*, 144 F.3d at 120-123. But as the Eleventh Circuit observed, that reading of AEDPA and IIRIRA is not faithful to their plain language: "AEDPA § 440 first eliminated the specific habeas review granted under former [8 U.S.C. 1105a(a)(10)]. Then IIRIRA enacted the broad language of [8 U.S.C. 1252(g)] that 'notwithstanding any other provision of law, no court shall have jurisdiction except as provided under [Section 1252].'" *Richardson*, 1998 WL 850045, at *13. Accordingly, the Eleventh Circuit correctly concluded (*ibid.*)—contrary to the court below—that Section 1252(g) "repeals any statutory jurisdiction over immigration decisions other than that conferred by [Section 1252]," including "[Section] 2241 habeas jurisdiction over immigration decisions."

In *Magana-Pizano* v. *INS*, 152 F.3d 1213 (1998), the Ninth Circuit reached the same result as that reached by the Second Circuit below and the First Circuit in *Goncalves*, but by a somewhat different approach. It had previously concluded (like the Eleventh Circuit in *Richardson*) that Congress *did*, in AEDPA and IIRIRA, abolish aliens' right to obtain review of their deportation orders in the district courts under Section 2241.[12] It then concluded in *Magana-*

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[12] The Ninth Circuit in *Magana-Pizano* relied on a previous decision of that court, *Hose* v. *INS*, 141 F.3d 932 (1998), which held (in a case not involving a criminal alien) that 8 U.S.C. 1252(g) (Supp. II 1996) withdrew the district court's jurisdiction under Section 2241 to hear the alien's challenge to her exclusion from the United States. See *Magana-Pizano*, 152 F.2d at 1217. On December 2, 1998, the court of appeals granted the alien's suggestion of rehearing en banc in *Hose* and vacated the panel

Pizano, however, that this restriction of access to the district courts violated the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, because (it believed) criminal aliens had been precluded from *any* access to the federal courts, and that, as a remedy for that asserted unconstitutional suspension of habeas corpus, criminal aliens should be permitted to invoke the district courts' habeas corpus jurisdiction under Section 2241. See 152 F.3d at 1220-1222. But as the *Richardson* court pointed out, the INA, as amended by AEDPA and IIRIRA, "still assures [criminal aliens] a significant degree of judicial review in the court of appeals after a final removal order," including judicial review of constitutional challenges to the INA itself, and "[s]uch judicial review clearly satisfies the Suspension Clause." *Richardson*, 1998 WL 850045, at *29. Therefore, the elimination of district court jurisdiction to review deportation orders under 28 U.S.C. 2241 presents no constitutional infirmity.

As we explain in greater detail in our certiorari petitions in *Goncalves* and *Magana-Pizano*, the decisions in those cases, holding that the district courts retain habeas corpus jurisdiction under 28 U.S.C. 2241 to review aliens' challenges to their deportation orders, are predicated on serious misreadings of the scheme for judicial review of deportation orders that Congress has enacted. Since 1961, Congress has consistently provided that such review should proceed in the courts of appeals, in order to avoid delays in deportations. See *Goncalves* Pet. 16 n.8. It reenacted that basic aspect of the judicial review scheme in 1996. See 8 U.S.C. 1252(a) (Supp. II 1996). In 1996, Congress also expressly eliminated the limited provision for habeas corpus review in the district courts that had remained in existence since 1961. See

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decision in that case. The Ninth Circuit has not, however, vacated its judgment or decision in *Magana-Pizano*.

AEDPA § 401(e), 110 Stat. 1268 (entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"). Further, it restricted judicial review of criminal aliens' deportation orders to a considerable degree, in both Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. See pp. 5-6, *supra*. And, to ensure that its exclusive-review procedures would not be circumvented, Congress also enacted Section 1252(g), which provides that, "notwithstanding any other provision of law," judicial review may not be had except under the procedures established in the INA itself. See generally pp. 6-7, *supra*.

These enactments demonstrate unequivocally that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals. Indeed, the Second Circuit panel in this case acknowledged (App. 30a n.9) that it would be more consistent with congressional intent for respondents' claims to proceed in the court of appeals (insofar as they may proceed anywhere), but it believed itself bound by the court's previous decision in *Jean-Baptiste*, which it read as categorically barring criminal aliens such as respondents from filing petitions for review directly in the courts of appeals. That conclusion, however (like the similar decisions in *Goncalves* and *Magana-Pizano*), rests on the faulty premise that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA prevent criminal aliens from raising *any* claim of *any* kind on petition for review in a court of appeals. Because the courts concluded in *Jean-Baptiste*, *Magana-Pizano*, and *Goncalves* that AEDPA and IIRIRA completely bar criminal aliens from proceeding in the courts of appeals, they expressed concern that, absent Section 2241, those aliens would have no access to judicial review of any kind—a situation that, they concluded, raises serious constitutional concerns under Article III and the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2. But as we explain in our petitions in *Goncalves* (at 19-21) and

Magana-Pizano (at 16-20), AEDPA and IIRIRA do not bar a criminal alien from raising a constitutional challenge to a provision of the INA itself in the court of appeals, or from seeking review in the court of appeals to the extent of contending that the alien does not fall within the category of persons for whom review is precluded—*i.e.*, that he is not an alien, that he was not convicted of the offense on which his deportation was based, or that that offense is not one for which judicial review is barred.

AEDPA and IIRIRA do, however, preclude the courts of appeals from considering the *non-constitutional* claims raised by respondents in these cases—namely, that the Attorney General erred in concluding that respondents were not eligible for discretionary relief from their concededly lawful deportation, and that the BIA erred in its conclusion that Yesil had not obtained the seven years' lawful domicile necessary to be eligible for such relief. Nor may those claims be presented to the district courts, for Section 1252(g) has withdrawn the district courts' authority to hear such claims as well. The withdrawal of the courts' authority to hear those claims, however, raises no constitutional concerns, for (as we explain further in our petitions in *Goncalves*, at 21-22, and *Magana-Pizano*, at 19-21), those claims do not fall within whatever scope of the habeas corpus remedy that is preserved by the Suspension of Habeas Corpus Clause.[13]

As we also explain in our petitions in *Goncalves* (at 23-24) and *Magana-Pizano* (at 25-26), a large number of aliens nationwide are in a situation similar to respondents'.

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[13] Even if a judicial forum were constitutionally required for those non-constitutional claims, they should be addressed in the court of appeals on petition for review, and not in the district court in habeas corpus proceedings. Such a construction of the immigration laws would be far more harmonious with Congress's design than is the result reached by the court of appeals, permitting respondents to proceed in district court, as the court of appeals itself acknowledged (App. 30a n.9).

Currently pending are approximately 466 petitions for review filed in the courts of appeals and 376 petitions for a writ of habeas corpus filed in the district courts in which criminal aliens have challenged the BIA's denial of Section 1182(c) relief to them based on the application of Section 440(d) of AEDPA. More than 200 such petitions for review have been filed in the Second Circuit alone, and many of those may now be refiled as habeas corpus petitions in the district courts. There are also about 2600 administrative cases still pending in which the temporal scope of Section 440(d) may be dispositive of the alien's deportation proceedings, and about 5400 others in which the BIA has dismissed the aliens' appeals based on *Soriano* (and in which the aliens might now seek to file habeas corpus petitions).

In light of the substantial and recurring importance of the jurisdictional questions for the administration of the Nation's immigration laws—as well as the conflict between the decisions in this case, *Goncalves*, and *Magana-Pizano* on the one hand, and the Eleventh Circuit's decision in *Richardson* on the other—this Court's review of the jurisdictional issue decided by the court of appeals is warranted. That jurisdictional issue is also presented in our certiorari petitions in *Goncalves* and *Magana-Pizano*. We therfore suggest that the Court hold the petition in this case pending its disposition of the certiorari petitions in *Goncalves* and *Magana-Pizano*.

2. The merits issue decided by the court of appeals also warrants review. As just explained, the question of the temporal scope of the amendments made by Section 440(d) affects thousands of aliens in pending judicial and administrative proceedings. If (contrary to our submission above) the courts do have jurisdiction to review aliens' claims that Section 440(d) does not apply to their cases, then this Court's resolution of the temporal scope of that Section is needed, so that the lower courts and the Attorney General will know

definitively whether the Attorney General must adjudicate thousands of applications for discretionary relief filed by criminal aliens in deportation proceedings. The issue of the temporal scope of Section 440(d) is also presented by our certiorari petition in *Goncalves* (see *Goncalves* Pet. 24-28). Accordingly, the Court therefore may wish to hold this petition pending its disposition of the certiorari petition in *Goncalves*.

The Second Circuit's holding that Section 440(d) of AEDPA does not apply to applications for discretionary relief from deportation that were filed before AEDPA was enacted, and the First Circuit's similar decision in *Goncalves*, are fundamentally at odds with the courts' historic treatment of deportation as inherently prospective in nature, in that it concerns the alien's right to remain in the country in the future. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("[T]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain.") Other courts of appeals have recognized that legislative changes affecting the Attorney General's discretionary authority to grant relief from deportation have "only a prospective impact." See *Schneidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996); see also *De Osorio* v. *INS*, 10 F.3d 1034, 1040 (4th Cir. 1993). Therefore, to the extent the court below and the *Goncalves* court approached the question of the temporal scope of Section 440(d) as a search for congressional intent concerning "retroactive application" of Section 440(d) (see App. 57a; *Goncalves*, 144 F.3d at 127), that approach was seriously misguided.[14]

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[14] In attempting to ascertain congressional intent on the question of "retroactivity," the court below (like the First Circuit in *Goncalves*) found it significant that Congress had specified that provisions making alien

Because AEDPA does not clearly provide that the amendments made by Section 440(d) to 8 U.S.C. 1182(c) are inapplicable to aliens who filed applications for discretionary relief prior to the enactment of AEDPA, the court of appeals should have deferred to the Attorney General's conclusion in *Soriano* that Section 440(d) should be applied to pending cases. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). As we explain in our petition in *Goncalves* (at 27-28), Section 440(a) of AEDPA (limiting judicial review for criminal aliens) and Section 440(d) (limiting their opportunities for discretionary relief from deportation) demonstrate that Congress was particularly concerned about the large number of deportable criminal aliens present in the United States, and sought to expedite their removal from the country. The Attorney General's decision in *Soriano* gives full effect to the legislative purposes underlying Section 440(d) and should not have been disturbed.

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terrorists ineligible for certain forms of relief should be applied to pending cases, and inferred therefrom that Congress had not intended that Section 440(d) be applied to pending cases. App. 55a-56a. But the court did not address the fact that, in at least three other sections of Title IV of AEDPA, Congress also provided that a particular amendment should *not* be applied to pending applications or pre-enactment events. See *Goncalves* Pet. 26-27. The legislative history of AEDPA is also ambiguous; since, in the final version of AEDPA, Congress expressly provided *both* that certain provisions of Title IV be applied prospectively only *and* that certain others be applied to pending cases, one can draw no firm conclusion from the fact that the conference committee dropped the Senate bill's effective-date provision for Section 440(d). See *id.* at 27 n.17. The most one can say about AEDPA on this point is that there is no clear pattern suggesting that Congress intended the amendments made by Title IV to apply only to post-enactment cases, unless otherwise stated.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petitions for a writ of certiorari in *Reno* v. *Goncalves*, No. 98-835, and *INS* v. *Magana-Pizano*, No. 98-836, and then disposed of consistent with the disposition of the petitions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998